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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~340~~ 45

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL., *Respondents*.

No. ~~340~~ 46

NATIONAL COAL ASSOCIATION, ET AL., *Petitioners*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL., *Respondents*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	6
Argument	
Scope of inquiry and range of decision are not without limitation	6
Unimportance of questions, utter deficiency of record on four of five policy considerations and lack of notice to industry prevent case from having posture for certiorari	7
Petitioner's interpretation of lower court decision unjustifiably narrow	9
Pattern for launching industry-wide regulations revealed in National Broadcasting Company v. United States, 319 U. S. 190, 193-196	10
First policy consideration	12, 20
Second policy consideration	12
Third policy consideration	15
Price impact on producer resale rates completely controllable under Sections 4 and 5 of the Act	15
Fourth policy consideration	17, 20
Fifth policy consideration	20, 21
(Federal, Air Pollution Control Act as Amended	21, 23
Conservation.—Cases and legislative history	23, 24
Absence of conflict of circuit court decisions	26
Form of remand of lower court	26
Coal petitioners	27
Conclusion	29
Appendix	App. 1-25

CITATIONS

CASES: Page

Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378 16
City of Pittsburgh v. Federal Power Commission, 237 F. 2nd 741 26
Charleston and W. C. Ry. Co. v. Federal Power Commission, 234 F. 2nd 62 26
Colorado-Wyoming Gas Co. v. Federal Power Commission, et al., 324 U.S. 626 13
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 ..... 23, 24
Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464 24
National Broadcasting Co. v. United States, 319 U.S. 190 ..... 6, 7, 10
National Coal Association v. Federal Power Commission, 191 F. 2nd 462 ..... 25, 26
Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 232 F. 2nd 467 10
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 .. 12, 16

STATUTES:

Natural Gas Act, Act of June 21, 1938, C. 556, 552 Stat. 821-833, as amended, 15 U.S.C. 717-717w:
Section 1(b) 5
Section 4 ..... 15, 16, 19
Section 7 ..... 3, 7, 15, 16, 17, 18, 19, 26
Section 7(e) 7
Section 14(a) 11, 12
Section 19(b) 2, 13
Section 20 17

Air Pollution Control Act, 69 Stat. 322; 42 U.S.C. 1857 (f), as amended September 22, 1959, 73 Stat. 646 ..... 3, 21, 23

MISCELLANEOUS:

Executive Order 10779, 23 F. R. 6487 3
House Report No. 960, 86th Cong., 1st Sess., 1959 (U. S. Code, Cong. and Adm. News, 1959, p. 2812 21
Federal Power Commission's Annual Report to Congress, 1940 24
Hearings before House Interstate and Foreign Commerce Committee on H. R. 5249, 77th Cong., 1st Sess., pp. 2-7 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 748

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL., *Respondents*.

No. 749

NATIONAL COAL ASSOCIATION, ET AL., *Petitioners*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL., *Respondents*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

Respondent, Transcontinental Gas Pipe Line Corporation, (Transco) files this brief in opposition to the Petitions for Writ of Certiorari filed herein and prays that said petitions be denied.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 5-24) is reported at 271 F. 2d 942. The orders of the Federal Power Commission denying the certificate application (R.[1] 174a-183a) and denying rehearing (R. 184a-194a) are reported at 21 FPC 138 and 21 FPC 399.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1959 (App., *infra*, p. 25). By order of Mr. Justice Brennan dated January 27, 1960, the time within which to file a petition for a writ of certiorari was extended to and including March 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

Consolidated Edison Company of New York, Inc. (Con. Edison), a New York electric, steam and gas utility, contracted to buy natural gas in the field in Texas for conversion,[2] in its Waterside electric and steam generating station in New York City, of the energy in said gas into the form of electric energy and also back into heat energy in the form of steam, for ultimate public use, or end use of said energy, by the populace of New York, for the operation of subways, electric elevators, electrical cooking ranges, electrical machines, and other electrical purposes and for the

[1] The reference "R." is to the Joint Appendix printed for use in the court below.

[2] This conversion process has been variously referred to by the Commission and its Staff and by opposing intervenors as "end use", characterized as "industrial use", eschewed as "boiler fuel use", and disparaged as an "inferior use".

steam heating of several large office and apartment buildings in the densely populated area of New York City.[3] The controlling reason for using the energy in gas instead of the energy in coal or oil was to avoid belching into the atmosphere of this densely populated area, 27,000 pounds of fly ash and 42,000 pounds of sulphur dioxide per day, caused by the use of coal, and thereby to comply with the harassing and long-continued demands of the Department of Air Pollution Control of the City of New York to eliminate this hazard.[4]

The New York company arranged for the transportation of the gas from the places of purchase in Texas to its point of conversion in New York. Transcontinental Gas Pipe Line Corporation, the transporting pipeline company, then applied to the Federal Power Commission for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act (15 U.S.C. 717f) to perform the transportation.

After finding that Transco had met all the conventional or orthodox requirements entitling it to a cer-

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[3] The lower court properly determined, "The cases the Commission had here were not those of the use of gas for industrial purposes only. There was involved also the use of gas in a step for space heating and lighting. That factor was completely ignored by the Commission as far as its Opinion reveals." (App. *infra*, page 24).

[4] In connection with the efforts of this Board, it is appropriate to give consideration to the Air Pollution Control Act (69 Stat. 322; 42 USC 1857 (f) as amended September 22, 1959, 73 Stat. 646), under which Congress appropriated $25,000,000 for cooperation by the Department of Health, Education and Welfare for cooperation with other Federal agencies and such agencies as the New York Board. Also see Executive Order 10779, 23 F.R. 6487 entitled "Cooperation of Federal Agencies with State and Local Authorities,".

tificate of public convenience and necessity, the Commission then proceeded to erect four so-called "policy considerations", without supporting evidence thereon in the record, added to the four a fifth policy consideration ("boiler fuel use") and, putting the five policy considerations into a package, concluded that the package "tipped the balance" in favor of denial of the certificate.

Both petitioners concede that under the Natural Gas Act, the Commission has no authority whatsoever either (a) to require that the producer making the aforesaid sale procure a certificate or (b) over the rate at which said sale is made.

The questions presented are:

(a) Congress having conferred upon the Commission plenary authority to regulate *the sale for resale* of natural gas in interstate commerce by a producer, may the Commission prevent an interstate sale *not* for resale (direct sale) by a producer to an electric and steam public utility for the purpose of forcing all producer interstate sales to be made for resale in order that the Commission may regulate the same through its certificate authority and through its rate authority?

(b) Under the factual situation outlined above may the Commission force each purchaser of gas from a producer in interstate commerce to purchase only for resale in order that the Commission may treat the sale by the seller as a sale for resale and thereby bring the seller under the Commission's certificate and rate authority, a jurisdiction or authority which Congress expressly withheld from the Commission?

(c) May the Commission, by the device of forcing all sales by the producer in interstate commerce to be made for resale, thereby bringing into play the Commission's certificate authority over independent producers, accomplish the end of exercising a general conservation authority over the totality of the natural gas reserves in the United States?

(d) Where the Congress has deliberately created an interstice in the Natural Gas Act by expressly precluding the authority of the Commission to act within the area of the interstice (Sec. 1 b), may the Commission under the guise of interstitial administrative action circumvent the affirmatively expressed will of Congress?

(e) May the Commission erect or create four novel "policy considerations", couple them with "boiler fuel use" and deny a certificate thereon upon assumptions of fact:

a. Which are contrary to the actual facts;

b. Where there is no supporting evidence in the record pertaining to said assumed facts;

c. Where no notice was afforded to the Applicant, prior to the close of the record, that the Commission proposed to utilize said policy considerations to deny the certificate; and

d. Where the Commission has made no findings of fact to support its policy considerations?

STATUTES INVOLVED

The pertinent portions of the Natural Gas Act are set out in the Appendix, *infra*, pp. 1-4.

ARGUMENT[5]

The thrust of the Commission petition is that the scope of Commission inquiry under the criterion "present or future public convenience and necessity" of Section 7(e) of the Act is, and must be broad, requiring Commission determination upon analysis of the "total situation" and petitioner's complaint is that the lower court construed the scope of Commission inquiry too narrowly.

While it is to be recognized that the breadth of inquiry can and should be sufficiently broad to effectuate the intent of Congress *under the Act* it must also be acknowledged that the scope of the inquiry—and more critically, the decisional range upon completion of inquiry—is not without limitation. " 'This criterion [public interest, convenience, or necessity] is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power * * * ' ". *National Broadcasting Company* v. *United States*, 319 U.S. 190, 216. "Generalities unrelated to *the living problems* of radio communication of course cannot justify

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[5] There will first be discussed the petition filed on behalf of the Federal Power Commission, petitioners in No. 748, followed by a brief comment on the petition of the National Coal Association, United Mine Workers of America, Fuels Research Council, Inc., petitioners in No. 749.

The word "petitioner" will be used to refer to the petitioner in No. 748 and "coal petitioners" will be used to refer to petitioners in No. 749.

All emphasis appearing herein is supplied unless otherwise indicated.

exercise of power by the Commission." *Ibid*, p. 216. *A fortiori* generalities cannot justify the exercise—directly or indirectly—of powers expressly denied to the Commission, as in the instant case where the Commission seeks to exert the utmost and ultimate power over a direct sale, to wit, the power to preclude or prevent it entirely.

To lend *certiorari* importance to this case there are deep and pervasive implications in the petition that the five policy considerations relied upon by the Commission for certificate denial are so broad and so basic that the holding of their invalidity—even as related to the circumstances of the instant case— would frustrate the administration of Section 7(e) and therefore the lower court decision must be overturned. Respondents, of course, do not agree with this position of petitioner.

If these "policy considerations" are of such transcendent importance in the administration of Section 7 and therefore of consequent crucial importance to the natural gas industry and the ultimate consumer, it is most baffling to try to understand the casual manner in which they came into being. No notice was given by the Commission, either in its setting of this matter for hearing or in any of its prior decisions, that any of its policy considerations (other than use of the gas) would be an issue in this case. No evidence whatsoever was introduced either by the Commission staff or any opposing intervenor. No issue was made on the record in respect to any of the policy considerations other than the use to be made of the gas. The first time any of the policy considerations (other than use of the gas) was brought up was after the record was completely closed. Then for the first time the four novel

policy considerations appeared in the staff brief. Subsequent to the conclusion of oral argument the Commission issued its decision. The four novel policy considerations in the staff brief were, in substance, paraphrased by the Commission, added to the consideration of end use and became the sole decisional factors upon which the certificate was denied.[6]

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[6] The five policy considerations are as follows (R. 178a-179a), App. *infra*, pp. 7-8:

1. "Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X-20 proposal, we would have no fair or rational basis for denying similar such requests."

2. "Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs[7] even though the bare authorization here sought would not of itself entirely nullify the Leidy Storage project."

3. "The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary."

4. "Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases. * * * But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier. And how long the

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[7] In its Order Denying Application for Rehearing, the Commission stated that "of course there can be no preemption of capacity not already built; but the construction and utilization of given capacity for service of the character proposed here would reasonably lessen the likelihood of capacity being constructed for other and future service of a character more in accordance with the requirements of public convenience and necessity." 21 F.P.C. at 402.

The lower court, giving its reasons, held that those decisional factors were insufficient to constitute a legally valid basis for denial and that is all it held. The lower court did not undertake to spell out what other factors the Commission might or might not consider in a certificate case; it limited its decision to the factors which the Commission did in fact use as the entire predicate for the Commission decision for certificate denial.

The petitioner would read the lower court decision contrariwise. The petition (p. 10) asserts:

> The Court below, in its insistence that the Commission could properly consider solely the 'conventional requirements' for granting or denying a certificate, would permit consideration not of the 'total situation' but merely of those narrow requirements which related to the particular applicant's ability to perform the proposed service.

Reasonably read, the above assertion of petitioner, interprets the lower court decision as laying down an all-inclusive principle or mandate that in no case, irrespective of the facts of the individual case, may the Commission consider and decide a certificate applica-

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pipeline can continue to buy in competition with nonjurisdictional, large volume purchasers, or indeed how willing it might be to undertake such less desirable service, is at least a question."

5. "These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even controlling, significance."[8]

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[8] 21 F.P.C. at 141.

tion on other factors than the conventional requirements. Respondents vigorously controvert the above quoted assertion and unfounded implication given to it by petitioner. In no reasonable manner may such interpretation be given to the lower court's action.[9]

Now, contrast the conception and birth of these allegedly crucial policy considerations with the manner in which policy considerations regarded as important by the Federal Communications Commission, were launched (as regulations) as revealed in *National Broadcasting Company* v. *United States*, 319 U. S. 190, 193-196. There the court devotes almost three full pages (193-196) to a recital of the due process steps taken by the Communications Commission, which recital is followed by the following statement (p. 196):

> Such is the history of the Chain Broadcasting Regulations. We turn now to the Regulations themselves, *illumined by the practices in the radio industry disclosed by the Commission's investigation.*

This Court will get no such illumination from the virtual blankness of the instant record on the Commission's four novel policy considerations. This is not to argue that policy may not be evolved from or through individual decisions. It is to argue, however, that before this Court is to be asked to review these policy considerations it should at least have the benefit of some sufficient record and some demonstration of ade-

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[9] See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467, 472, (3rd Cir. 1956), *cert. denied* 352 U.S. 891 (1956) in the decision of which Judges Hastie and Staley, who were on the panel of the lower court in the instant case, also were participants.

quate study having been given to them by the Commission. If the policy considerations are as important and as pervasive of the whole industry as petitioner would have them appear, then they take on the stature of industry-wide *regulations*. If treated as such, then they are tantamount to a mandate:

(a) That no producer shall sell natural gas in interstate commerce unless the sale be a sale for resale;

(b) That no natural gas pipeline company shall transport natural gas in interstate commerce unless the gas shall have been sold for resale; and

(c) That no public utility shall purchase natural gas in interstate commerce unless the purchase is made for purposes of resale.

Since no notice was given to anyone—to no producer, to no pipeline, not even to Transco, and to no electric utility, not even Con Edison—that any of the four novel policy considerations would be an issue in this proceeding, grave questions of inequity, if not of due process, are presented.

Under Section 14(a) of the Act, the Federal Power Commission has powers similar to those of the Federal Communications Commission to conduct investigations for the purpose of prescribing rules and regulations thereunder.[10] The record in this case is totally lacking

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[10] Section 14(a).—"The Commission may investigate any facts, conditions, practices or matters which it may find necessary or proper * * * in prescribing rules or regulations thereunder * * *."

in evidence of industry practice, and provides a completely inadequate vehicle for launching industry-wide regulations. Proper administrative practice would suggest that the four novel policy considerations be made the subject of the Commission's Section 14(a) powers, if the Commission regards such considerations as having general importance. Certiorari in the instant case should not be made the solution.

Transco does not believe that the apprehensions of the Commission, envisioned by their policy considerations, have any real or material substance. Industry realities strongly militate against the validity of their policy conclusions.

For example, in refutation of the first policy consideration, direct nonjurisdictional purchases in interstate commerce from producers have been so relatively few since the passage of the Natural Gas Act, despite non-asserted Commission jurisdiction over producers prior to 1954[11] that it is gravely doubtful that there is hidden in the offing any "vast, new, unregulated, interstate market for gas—by industrial enterprises purchasing for their own use * * *" (Petition, p. 9). Certainly the record lacks evidence to the contrary.

The Commission's second policy consideration in respect to "pre-emption" might have the superficial ring of a product of expertise to a layman or one not versed in industry facts. Contrariwise, "economic realities peculiar to the natural gas industry" (Petition, p. 13), and the very history of Transco before the Commission render fatuous the notion that "the authorization of this [transportation of directly-purchased gas] and like proposals would pre-empt for this usage capacity

[11] June 7, 1954 is the date of this court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

which would otherwise be available to meet more urgent and widely beneficial public needs." There is not a word in the record on this subject and no finding was made other than the Commission's barren conclusion.[12] Furthermore, this concern is flatly negated by the actual facts. At the very time that the Commission was writing its decision herein there was on file an application by Transco in FPC Docket G-16603 for an increase of approximately 130,000 Mcf of capacity for resale gas *over and above* the 50,000 Mcf per day for the X-20 service which had been previously applied for in Docket G-13143 and which is the subject of the instant case.

Transco has methodically expanded its system to meet the normal growth of the natural gas market

[12] In *Colorado-Wyoming Gas Co.* v. *Federal Power Commission, et al.*, 324 U.S. 626, 634, it is stated:

> "The review which Congress has provided for these rate orders is limited. Section 19(b), 15 U.S.C.A. § 717r(b) says that the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. State of Florida v. United States, 282 U.S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291; United States v. Baltimore & Ohio R. Co., 293 U.S. 454, 464, 55 S. Ct. 268, 273, 79 L. Ed. 587; United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 504, 505, 510, 511, 55 S. Ct. 462, 464, 465, 467, 79 L. Ed. 1023; United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 488, 489, 62 S. Ct. 722, 729, 730, 86 L. Ed. 971. Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. § 19(b). The Court cannot perform the function which Congress assigned to them in absence of adequate findings. Nor are they authorized under § 19(b) to make findings and substitute them for those of the Commission."

which it serves.[13] Furthermore there is a strong drive for Transco to increase its service as rapidly as market demands will economically absorb the service. Each year Transco's rate base is decreased by several million dollars through depreciation.[14] Transco is forced to reinvest these depreciation sums merely to "stay even", that is to avoid the impact of "the vanishing rate base". The same problem pervades the whole pipe line industry. Furthermore, the business drive of the industry, as eminently demonstrated by the huge post-war expansion, has been and is to reach out into every cranny of the nation where an economic demand for gas manifests itself. It is thus made obvious that the Commission's policy determination in respect to preemption of capacity is not only utterly without record foundation—it is based on an assumption contrary to the actual facts in respect to Transco, of which it properly should have taken judicial notice

[13] The following table demonstrates the pattern of expansion since 1955:

Program	FPC Docket	FPC Authorization	Authorized Increase in Plant	Increase in Peak Day Service
1955	G-4185	14 FPC 1	$ 48,205,000	92,722 Mcf
1956	G-10000	17 FPC 360	$ 50,858,000	124,644 Mcf
1957	G-12059	18 FPC 710 *	$ 51,600,000	114,078 Mcf
1958	G-13143	20 FPC 264	$147,000,000	367,515 Mcf
1959	G-16603	22 FPC —*	$ 76,910,000*	138,589 Mcf
1960	G-20107	**	$ 51,687,000**	108,823 Mcf**

* By order issued November 17, 1959, the Commission authorized Transco to undertake all of the proposed service and to construct approximately $53,000,000 of the proposed new facilities. The Commission severed for later decision the question of authorizing the balance of the proposed new plant.

** Filed with the Commission on November 12, 1959.

[14] Currently this figure is running approximately $16,000,000 per year. (Docket No. G-18,783, Application, Statement A.)

and contrary to the actual facts in respect to virtually the whole pipeline industry. Neither "Commission expertise" nor the process of "interstitial legislation" can convert these cold hard facts into their opposites.

The third policy consideration is in substance that "the impact of large demand on relatively limited supply is certain enough to raise rates." The quick short answer to this statement is *"not unless the Commission abdicates its authority under Sections 4 and 7 of the Act."*

The petition characterizes this policy declaration thus (p. 14):

> This is the *point* of the matter, and the *crux of the Commission's concern* in this case for the public interest—the propensity of unregulated sales to drive up the price of gas.

and states (p. 13):

> Indeed, denial of Transco's application could have been predicated upon price considerations alone.

If petitioner's statement be given full weight then it would seem that petitioner's reliance upon the other four policy considerations should be abandoned as "make-weights". But this indeed would be awkward from petitioner's standpoint since the Commission decision makes clear that it was *all five* policy considerations, which when thrown into the scale, made up the "complex" of considerations, which as a package, "tipped the balance" in favor of certificate denial.

We come back to the merit of this price-impact declaration of the Commission. When the petition speaks of "the propensity of unregulated sales to drive up the price of gas" it is obviously referring to the

price of gas sold by the producer for resale over which it *does* have jurisdiction.

The question sharply poses itself as to how many more tools the Commission requires in order to control the price of producers' sales of resale gas. If the *initial* price is too high the Commission has adequate authority to control that price. *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378. If a *presently effective* price charged by a producer for resale gas is sought to be raised the Commission has adequate authority under Section 4 to control that price within the limits of "just and reasonable." These two sections of the Act (4 and 7) have, since the *Phillips* decision *supra,* given the Commission a complete throttle (i.e., adequate and efficacious legislative machinery) to keep reasonable all future initial rates and proposed increases in rates for resale. Inadequate accomplishments, if any, in the field of rate control of sales for resale by producers simply cannot be charged up to inadequacy of the legislative machinery placed at the Commission's disposal; the results to date can properly be charged only to the operation of the machinery.

"What the traffic will bear" in a sale *not* for resale cannot be the controlling standard for a jurisdictional sale. If there is one thing *Atlantic Refining* teaches, it is that the Commission is not legally bound to let every sale price in the field control the regulated price. *A fortiori* the Commission cannot discard its legislative throttle because of a producer's sale not for resale.

An alternative statement of the Commission's position boils down to this: Sections 4 and 7 of the Act

are inadequate legislative tools to accomplish control of prices in producers' sales for resale; what is actually needed is statutory authority over sales not for resale; but since Congress expressly withheld this authority, sales not for resale must be prohibited entirely; therefore Commission authority over transportation in Section 7 must be stretched over the legislative gap and thereby give the gap the appearance of not existing at all. This, the lower court held, the Commission did not have authority to do. We feel the lower court was right, both for the practical reasons set out above and on elementary principles of statutory construction.

The fourth policy consideration, not readily lending itself to abbreviation, is here stated in full:

> Large purchasers of gas, like Consolidated Edison, can readily compete with the pipelines for gas purchases. * * * But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier and how long the pipeline can continue to buy in competition with nonjurisdictional large volume purchasers, or indeed how willing it might be to undertake such less desirable service, is at least a question.

There is nothing in the Natural Gas Act to indicate that Congress intended that pipeline companies as distinguished from distributor-utility companies should, as a select group, have a monopoly on gas purchases in the field. On the contrary, Congress indicated clearly in the Act itself that the entire statute should be so administered as to avoid violations of the antitrust laws. Section 20 of the Act (15 U.S.C. § 717s(a)) is directly in point:

> The Commission may transmit such evidence as may be available concerning * * * apparent viola-

> tions of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

If two gas pipeline companies, natural gas companies under the Act, should undertake any kind of concerted action to prevent a distributor-utility, or in fact any other person, from purchasing gas in the producing fields, it is believed they would be courting serious trouble under the antitrust laws. It is doubtful that the Commission has power, under the transportation authority of Section 7, to confer a monopoly over the purchase of natural gas in the field and to limit that monopoly to natural gas pipelines under the Natural Gas Act. Apparently the Commission reconciles its action on some theory that it is thereby protecting the small customer of the interstate pipeline company. The Commission observes (R. 179a):

> That the small purchaser may not be as fortunate [as a large purchaser like Consolidated Edison]. He will have to rely on the pipeline supplier.

There are several small purchasers, both private and municipal, on Transco's system and every one of them is receiving every Mcf of gas it has shown a need for, which has been allocated to it by the Federal Power Commission, and at rates fixed by the Commission. This is precisely what Congress intended, namely, adequate service at reasonable rates. These two objectives represent the fundamental purposes of Congress in passing the Natural Gas Act.

The principal and special objective of Con Edison's purchase in the instant case was to comply with the demands of the Department of Air Pollution Control

of the City of New York but, because of Transco's tariff limitations, it could not procure a firm supply from Transco. Since Con Edison, as will be demonstrated in its brief in opposition to the petition, would actually pay more for the transportation gas, delivered at New York, than it is required to pay for resale gas purchased from Transco, it requires subtle reasoning to arrive at the conclusion that the smaller purchaser is disadvantaged because it does not purchase under a direct sale in the field.

As an addendum the Commission queries (R. 179a):

> And how long the pipeline can continue to buy in competition with *non-jurisdictional,* large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question.[15]

The overwhelming bulk of the competition which Transco has in the purchase of gas is from other pipelines purchasing gas for resale and intrastate purchasers and not from purchasers in interstate commerce of gas not for resale. It is illogical to assume that direct purchasers, except under very extraordinary circumstances, are going to pay more for gas (delivered at place of consumption) than the price they would have to pay for jurisdictional purchases from a pipeline. This economic interest of the direct purchaser would in no wise be controlled by the desire of the producer to escape regulation.

Having adopted the four novel policy considerations which appeared for the first time in the staff brief to

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[15] Just what is meant by "how willing it might be to undertake such ' ss desirable service" is confusing, to say the least.

the Examiner, the Commission concludes its reasons for denial in the following "policy consideration":

> (5) These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, *they* take on more serious, even *controlling,* significance.

It was this "end use" consideration which gave rise initially to the following statement of the lower court (App. infra, p. 10):

> Our conclusion in these cases is that the Commission has gone beyond its authority in denying the certificate here. We think that what the Commission has in effect done is to assert, by its examination and disapproval of the end use to be made of this gas, a *general* allocation and *conservation* authority over the natural gas fields of the United States.

After reviewing at some length the bases for its conclusion that Congress had not vested a general conservation of authority over the gas fields of the United States, the lower court then takes up and gives its reasons for disapproval of each of the five policy considerations relied upon by the Commission. (App. infra, pp. 21-24). It disapproved the second and third policy considerations on the ground that these were an assertion of general conservation authority which the Commission does not possess (App. infra, pp. 21-24). And that the second should have been based on evidence.

The first and fourth policy considerations were disapproved on grounds other than improper assertion

of Commission conservation authority. As to the fifth or "end use" consideration, the lower court (App. *infra* pp. 23-24) goes further than disapproval on conservation grounds and disagrees with the Commission's conclusion that the proposed use was "inferior". As we read the Opinion, the language of the court (App. infra, pp. 23-24) clearly indicates that there was no rational basis for this "inferior" conclusion. Respondents go further and boldly assert that this "inferior" conclusion of the Commission was utterly irrational, was in cold conflict with the overwhelming weight of the evidence on this subject, and flies into the teeth of the objectives sought to be accomplished by Congress in the Air Pollution Control Act of 1955, as amended, and should be flatly disapproved.[16] In support of this

[16] House Report No. 960, 86th Cong., 1st Sess., 1959, to accompany H.R. 7476 (U.S. Code, Cong. and Adm. News, 1959, p. 2812) sheds interesting illumination on the subject. Excerpts therefrom are the following:

> "Air pollution is a national problem in its truest sense. It affects the total human environment and requires that all affected interests participate in seeking effective solutions among the many health, social, economic, and other complex aspects of the problem.
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> • • • • • • • •
>
> "Data have been developed about many ways in which air pollution subtly affects human health, including specific knowledge about the effects of agents such as ozone and *sulfur dioxide*, which are *directly toxic* and physiologically damaging and certain olefin compounds which can cause eye irritation in humans and serious toxic effects in experimental animals.
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> • • • • • • • •
>
> Specific information or indications have come out of some of the research, particularly regarding health effects, that certain pollutants in the air have affected health, as in the case of the drastic air pollution episodes in Donora, Pa., and London, England. These pollutants have increased the death

assertion, we urgently invite the Court's attention to the testimony of Otto Manz, appearing at pages 4a-24a and 73a-101a, and to the testimony of Dr. Leonard Greenberg, appearing at pages 36a-54a and 110a-116a, of the Joint Appendix before the lower court, which has been filed as the record in this Court. That testimony shows that over several years, in its struggle to alleviate the air pollution nuisance created by its Waterside Station, Con Edison had spent many millions without accomplishing anything approaching satisfactory results. It shows that Con Edison had been repeatedly harassed or pursued by the Air Pollution Control Board in respect to air pollution. It shows that there was being poured into the atmosphere of New York 15,000 pounds of fly ash a day, and 42,000 pounds of sulphur dioxide a day; that the substitution of gas to fire Con Edison's boilers would eliminate both the sulphur dioxide and the fly ash; that the substitution of oil for coal would eliminate the fly ash but not avoid the more serious sulphur dioxide; that if not permitted to use gas, Con Edison would turn to the use of oil, a more readily exhaustible natural resource than gas. The record also shows that the energy in the gas was to be converted into electricity for all kinds of uses in New York City, and into steam for heating a large number of big office and apartment buildings in this densely populated area of

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rates, particularly during the period of the smog and more particularly in old and debilitated people. But most of the health effects of air pollutants are much more subtle than that. They are long-term detractors of good health. In the hearings, the subcommittee was told that it is known there are pollutants in the air which cause *cancer*, particularly in laboratory animals, and that death rates for certain types of *cancer* and respiratory conditions are greater in urban areas where the smog is more common."

New York. The Commission gave all of this testimony very short shrift, with the superficial observation that (R. 178a):

> Likewise, the idea of relieving the United Nations Headquarters of an unpleasant and annoying smoke nuisance from the particular boilers in which this gas is proposed to be burned is an appealing one.

And (R. 181a):

> Although as indicated, the idea of ameliorating a smoke condition found unpleasant and annoying by the workers in a unique facility, the United Nations headquarters building, is an attractive one, more weighty considerations compel the denial of the grant.[17]

Furthermore, the Commission paid little heed to the concern of Congress about air pollution control as evidenced in the Air Pollution Control Act (1955), 69 Stat. 322; 42 U.S.C. 1857f, to which their attention was specifically called in the testimony of Dr. Leonard Greenberg, Chairman of the Air Pollution Control Board of the City of New York.

The lower court (App. infra, pp. 10, 23-24) was more than justified in its disapproval of the Commission's treatment of the "end use" of the gas.

Conservation. At pages 15-24, the petition discusses the place of conservation in this case.

In its reference to *FPC* v. *Hope Natural Gas Company,* 320 U.S. 591, petitioner is relying upon sheer

[17] The further mention of air pollution in the order denying rehearing adds little to the above statement. (R. 191a-192a).

dictum. Petition next refers to *FPC* v. *East Ohio Gas Company*, 338 U.S. 464, 468-469, in which case, says the petitioner, the Court confirmed its interpretation of the 1942 Amendment. Apparently the interpretation referred to was the dictum in the above *Hope Natural* case. As to the Court's statement in *East Ohio*, it is true that the 1942 Amendment broadened the Commission's power over the construction or extension of pipelines; prior to the 1942 Amendment the Commission had no jurisdiction in a pipeline certificate case unless the pipeline was going into a market already served by another gas pipeline. The basic purpose of the Amendment was to confer jurisdiction on the Commission over all pipeline certificates, whether into a new market or one already being served.

In petitioner's quotation (p. 17) from East Ohio, the Court's 1 ootnote is omitted. The Court's statement that this Amendment followed a report of the Commission to the Congress was merely a reference to the Commission's *Annual Report of 1940* and not to any report by the Commission to the Congress in respect to the bill itself. The Commission did make a report to the Congress on the bill itself, but this report made no reference to conservation as one of the purposes to be accomplished by the Amendment. As a matter of fact, as the court below pointed out, (App. infra, 14, 20, 21) the Commission repeatedly, in its *Annual Reports* to Congress, *subsequent* to the passage of the 1942 Amendment, requested that it be given conservation authority, which request has never been granted.

The petition (p. 17) next discusses the legislative history of the 1942 Amendment. It opens the discussion with the following statement:

> This interpretation of the 1942 amendment is fully supported, at least as to end-use conservation through the consideration of competing fuels, by the legislative history of the Act.

This is a very adroit sentence. It very deftly takes the two concepts of (a) conservation and (b) consideration of competing fuel interests, and fuses the two concepts into one. It is true that the 1942 Amendment empowered the Commission in a certificate case to consider the impact of natural gas upon the economic interests of competing fuels. The coal interests participated in conferences leading up to the introduction of the legislation, and appeared before the Congressional Committee considering the Amendment. But the legislative history of the Act will be searched in vain for any indication that it was intended to give the Federal Power Commission any power over the general conservation of natural gas.[18]

When these two concepts, (a) conservation and (b) impact on the interests of competing fuels, are kept clearly in mind, the legislative history of the 1942 Amendment can easily be understood. In *National Coal Association* v. *FPC*, 191 F. 2d. 462, these two

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[18] Mr. Basil Manley was the supervising Federal Power Commissioner under whose direction the 1942 Amendment was drafted and he testified before the Congressional Committee as to the purpose of the Amendment. His testimony appears at pages 2-7 of the Hearings Before the House Interstate and Foreign Commerce Committee on H.R. 5249, a Bill to Amend Section 7 of the Natural Gas Act. Nowhere in his testimony was the word "conservation" even mentioned. He did make clear, however, that the Amendment would clarify the Commission's authority to consider the impact of natural gas on the interests of "producers of competing fuels and the operators of competitive methods of transportation whose economic interest may be affected by the construction or extension of pipelines".

concepts were presented to the Court as two separate concepts. At page 467, the Court states:

> Coming now to the merits, petitioners say that before the Commission can grant a certificate of necessity, it must consider as separate and independent elements (1) the effect of issuance of the certificate upon competing fuels and transportation and related labor interests, and (2) the relation of the project to conservation of natural gas. Although considerations such as those suggested by petitioners *may well be* part of the *complex* out of which the Commission's judgment as to "public convenience and necessity" arises, they are nowhere made standards governing the issuance or denial of certificates.

Conflict of Circuits. At page 24, the petition undertakes to suggest a conflict of Circuit Court decisions "at least in principle". Reference is made to *City of Pittsburgh* v. *FPC*, 237 F. 2d 741, 746-748 (CADC). This case had nothing to do with conservation. It had to do with impact on a competitive carrier.

Similarly, *National Coal Association* v. *FPC*, 191 F. 2d 462, 466-467 (CADC), and *Charleston & W.C. Ry. Co.* v. *FPC*, 234 F. 2d 62 (CADC), dealt with a conflict between an applicant for a certificate under Section 7 and competing fuel interests. To erect a conflict out of these Circuit Court decisions, even "in principle", requires large ingenuity. There is no conflict.

Form of Remand. Petition (p. 25) asserts that the court also erred in remanding the case to the Commission "with direction to issue the certificate applied for". Petitioner suggests that if the case were remanded to the Commission;

> The ultimate determination of the public interest in the light of the court's opinion and perhaps

other factors which the Commission had earlier felt need not be weighed, would be for the Commission and not for the court.

The suggestion in the underscored language from the quote is certainly shocking to contemplate. In the instant case, the Commission found that the applicant had complied with all of the conventional requirements for a certificate. It then erected five reasons for denial. All of these reasons were found invalid. Must this case now be referred back to the Commission to scrape up additional reasons for the denial? Any project can be more effectively killed by the attrition process than by formal final decision. The formal final decision is at least appealable. If this case is remanded to the Commission on the sheer technicality suggested by petitioner, it may well drag on for at least another year before final Commission action. Large and intricate business projects do not survive any such procedure.

Then, if on the next go-around the Commission for some new-found reason again denies the certificate, the whole circuit of action must be repeated. If the lower court was correct in holding invalid the bases for the Commission's decision, then on the facts of this case there remains merely a ministerial act to be performed. Had the court's order merely read that the case was remanded to the Commission "for action in accordance with this opinion", there could have been no ground of criticism. The remand actually issued by the lower court means no more.

Coal Petitioners

No. 749

As in the case of the Government petitioner, the coal petitioners for their purposes also would fuse and thus make identical the concepts of (a) conservation and (b) consideration of competing fuel interests. As was

pointed out above, the two are separate concepts. The lower court held that, under the Act, Congress did not confer a general conservation authority over the natural gas resources of the United States upon the Commission. The Commission itself did not pass upon the impact of the transportation gas upon the competing coal interests. As we stated above, neither the Commission nor the coal petitioners introduced any evidence whatsoever. There was, therefore, no evidence in the record upon which the Commission could have made a determination as to the monetary losses or other adverse impacts on the petitioners' economic disadvantage.

Of course the interest of the coal petitioners is obviously not in conservation *per se*. Ideal conservation for those interests would be accomplished by preventing the production of a single Mcf of gas or the prohibition of the movement of any gas in interstate commerce. But the legislative history of the Act indicates that the coal interests were to be permitted to intervene in certificate cases for the purpose of being permitted to show upon the record the adverse economic effect upon them of the introduction or expansion in use of natural gas. As we pointed out above, nothing in the legislative history of the 1942 amendment touched upon the subject of conservation. Therefore, there is no indication that the permissive intervention of the coal interests was for the purpose of bringing about the general conservation of the gas resources of the nation.

At page 24 of the coal petition the form of the court's order to the Commission is discussed and at page 25 it is stated:

> * * * It, [the court] could not assume the Commission's decisional authority and decree the grant of the application, thereby foreclosing the Commission *from a new look* at the requirements of

the public convenience and necessity under the changed circumstances of the case.

As in the case of the Government petitioner, the coal petitioners are suggesting that the case should have been sent back to the Commission, on open remand, to permit the Commission to fashion further reasons, other than its five policy considerations, in an attempt to deny the certificate. The coal petitioners, having put in no evidence at all, although having every opportunity to do so, would apparently now like to retry the case. What we said *supra*, in commenting upon the similar suggestion of the Government petition is equally applicable here. Considerations of fair play and of the admonition that sometime there must be an end to litigation, require that this case be decided on the present record.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writ of certiorari be denied.

Respectfully submitted

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APPENDIX A

Excerpts from the Natural Gas Act, as Amended

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U. S. C. § 717 (a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. § 717 (b)]

* * * * * * * * * * *

SEC. 7.

* * * * * * * * * * *

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed

[1] Subsection 7 (c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required

in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c)][2]

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[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*: That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, which amended Section 7 (c), effective February 7, 1942, was enacted after the Commission's decision *In the Matter of Kansas Pipe Line & Gas Company*, 2 F. P. C. 29.

(e) [1] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

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[1] Subsection 7 (e) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 12908, 12929 and 12930

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER IN No. 12908
THE CITY OF NEW YORK, PETITIONER IN No. 12929
TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER IN No. 12930

v.

FEDERAL POWER COMMISSION, RESPONDENT
NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC., INTERVENORS
SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, INTERVENORS

On Petition for Review of Orders of the Federal Power Commission

Argued September 25, 1959

Before GOODRICH, STALEY, and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed November 3, 1959)

By GOODRICH, *Circuit Judge*. We have before us three cases which were consolidated for argument. The main case is a petition by Transcontinental Gas Pipe Line Corporation (Transco) to set aside an order of the Federal Power Commission which refused to issue it a certificate of public convenience and necessity. Another case is a petition by Consolidated Edison Company of New York, Inc. (Con Edison) seeking the same relief. The same is true of the petition brought by the City of New York. Joining with the Commission are intervenors National Coal Association, United Mine Workers of America and Fuels Research Council, Inc. Filing a brief also as amici curiae

are Southern California Gas Company and Southern Counties Gas Company of California. For the opinion and order below see *Transcontinental Gas Pipe Line Corp.*, 21 F.P.C. 138, *rehearing denied* 21 F.P.C. 399 (1959).

The essential facts can be briefly stated. Con Edison went into Texas and made a contract with producers for the purchase of natural gas in the Texas field. Then it made an agreement with Transco providing for what is called "X-20 service." Transco agreed to transport the gas to New York and deliver it there to Con Edison. Included in the agreement was a provision for a sixty-day-a-year service which Transco agreed to render Con Edison from its own gas reserves and during the time this service was furnished the Con Edison supply from Texas would not be used. Con Edison agreed with the producers not to sell this gas at retail in New York. It is to be used to fire two of the ten boilers in Con Edison's Waterside plant near 42nd Street and East River in New York City. The City of New York is interested in the litigation because by the substitution of gas for coal, now being used to fire the boilers which Con Edison has at this plant, the very considerable amount of fly ash and the very considerable amount of sulfur dioxide poured into the air in this densely populated portion of New York City will be greatly reduced.

In the opinion and order denying the certificate the Commission agreed that the "conventional requirements" of public convenience and necessity had been satisfied by the showing made.[1] The matter of markets, facilities, gas supply and rates[2] are included in these "conventional require-

[1] 21 F.P.C. at 141.

[2] The Commission noted in its order that a minor portion of the rate structure, dealing with the rate for the transportation of the "displaced" gas had not, in its opinion, been substantiated on the record. 21 F.P.C. at 141 n. 3. The petitioners dispute this finding. However, all concerned agree "that the Commis-

ments." The Commission, however, overruling its presiding examiner, denied the certificate and gave five policy reasons for doing so. Since the soundness of these reasons is the heart of the controversy, we set them out in full in the Commission's language. Here they are:

> 1. "Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X-20 proposal, we would have no fair or rational basis for denying similar such requests."
>
> 2. "Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs[3] even though the bare authorization here sought would not of itself entirely nullify the Leidy Storage project."
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> 3. "The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary."
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> 4. "Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases. * * * But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline

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sion did not rely upon that deficiency as a ground for denying the certificate. Had the Commission otherwise been able to grant the certificate, it would presumably have remedied the defect by a condition." Brief for the FPC, p. 5 n. 10.

[3] In its Order Denying Application for Rehearing, the Commission stated that "of course there can be no preemption of capacity not already built; but the construction and utilization of given capacity for service of the character proposed here would reasonably lessen the likelihood of capacity being constructed for other and future service of a character more in accordance with the requirements of public convenience and necessity." 21 F.P.C. at 402.

supplier. And how long the pipeline can continue to buy in competition with nonjurisdictional, large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question."

5. "These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even controlling, significance."[4]

When the basis of the controversy is understood it gets down to a point which is easily stated although difficult to answer. It is agreed by all parties that the purchase by Con Edison of the gas in Texas is not subject to the jurisdiction of the Commission. Con Edison can buy as much gas as it can pay for in Texas and there is nothing the Commission can do about it. The same is true of the use which Con Edison makes of this gas when it gets to New York. Since it is not to be the subject of re-sale in that state, the Commission has nothing to say about its use either.

Section 1(b) of the Natural Gas Act[5] sets out specifically its coverage as follows:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C.A. § 717(b).

[4] 21 F.P.C. at 141.

[5] 15 U.S.C.A. § 717-717w.

As the presiding examiner pointed out in his opinion,[6] if Con Edison could liquefy this gas and transport it by truck or by ship to New York City there would be nothing for the Commission to take hold of. The question, therefore, comes down to the scope of the authority of the Commission given by Section 7 of the Act which provides for the certificate of convenience and necessity.[7] How far does this phrase let the Commission go?

Anyone can see that the phrase is a vague one, something like "due process of law," out of which one can get what he cares to put in. It is, obviously, the kind of a phrase where experience through the years builds up criteria which must be met in determining its content. Such experience-built criteria were what the Commission looked

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[6] *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 303, 316 (1958).

[7] "No natural-gas company * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. * * *" 15 U.S.C.A. § 717f(c).

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extenson, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C.A. § 717f(e).

at when it saw that the "conventional requirements" for convenience and necessity had been met.

Our conclusion in these cases is that the Commission has gone beyond its authority in denying the certificate here. We think that what the Commission has in effect done is to assert, by its examination and disapproval of the end use to be made of this gas, a general allocation and conservation authority over the natural gas fields of the United States. Inspection of the reasons assigned by the Commission for its denial shows clearly, we think, that it disapproves of the use to be made of this gas in New York City as boiler fuel, as contrasted with the use possibly to be made of it were it to be devoted, at some future time, to house heating and domestic use.

The Commission's argument to this Court talks about interstitial legislative authority to be exercised by a regulatory body. This is quite all right; we agree that the administrative process may clothe the skeleton of a statute with flesh, as the Commission argues. But the interstitial process cannot put new provisions into a statute. That general statement everybody would agree upon. The question is, has it done so here?

The Commission's brief talks about the "inadequacy of state power to reconcile conflicting state interests."[8] This bold assertion requires us to examine carefully the legislative history behind the statute.

The 1936 report of the Federal Trade Commission to the Senate, which is specifically singled out in the introductory clause of section 1(a) of the Natural Gas Act as a source of the policy of the Act,[9] is relied on by the Commis-

[8] Brief for the FPC, p. 40.

[9] "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is de-

sion as authority for its consideration of the end use to be made of the gas in exercising its certificating jurisdiction. It cannot be disputed that the report, which runs over 600 pages, makes a brief mention of the conflict between industrial and household uses.[10] But it is only a brief mention that is made; in neither its summary of findings [11] nor in its conclusions and recommendations [12] does the report make any mention of the matter. It is true that in its enumerated conclusion the report refers to "conservation." But a closer reading of that conclusion, together with the emphasis of the rest of the report, reveals that what was really being referred to was physical waste in the production aspects and the use of gas in gasoline

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clared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C.A. § 717(a).

[10] "The present transportation of natural gas in the large pipeline systems is intimately concerned with the sale of large or major portions of the gas so transported to industries of the general type outlined above. [This refers to use of gas for electric power plants, firing of large boilers and furnaces, brick kilns, steel mills, etc.] The gas industry claims that the supply to general consumers at prevailing prices is only made possible by the quantity sales to industry in direct competition with coal and oil. Whether such a situation is essential to maintain service at moderate prices is one problem, but it does not eliminate the fact that every thousand feet used to replace coal in large operations has diminished the future supply of natural gas available for the householder and other retail consumers, which may be considered the highest grade of service to which natural gas may be put." Federal Trade Commission, *Final Report to the Senate of the United States*, S. Doc. No. 92, Part 84-A, 70th Cong., 1st Sess. 125 (1936).

[11] *Id.* at 581-606.

[12] *Id.* at 607-17.

extraction and the manufacture of carbon black.[13] In its listing of 16 specific evils in the industry the report refers to "a great waste of natural gas in *production*," but nowhere refers to end use problems.[14]

The sole recommendation of the report with respect to "conservation" was that the producing states enter into interstate compacts with each other[15] with accompanying "Federal legislation prohibiting the transportation in interstate or foreign commerce of natural gas *produced or released from storage* in excess of the State's quota or *produced* in violation of other State conversation laws and regulations."[16] It also recommended that a federal agency "be empowered to investigate the supply of and demand for natural gas throughout the country, to keep such information current, and to advise and recommend to State regulatory boards regarding the proper amount to be fixed by them from time to time as the several State quotas."[17] The result of this advice was the enactment of Section 11 of the Natural Gas Act which empowered the Federal Power Commission to assemble information and

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[13] "1. Conservation is the first problem that demands attention. Vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses. This has been estimated to amount to as much as a billion and a quarter cubic feet per day in one field. Witnesses having expert knowledge testified that this amount of *daily waste* is sufficient to supply the entire present needs of the domestic and commercial users of natural gas in the United States." *Id.* at 608 (emphasis supplied). This is clearly referring to the waste type problems discussed earlier in the report. *Id* at 92-101.

[14] *Id.* at 615-16 (emphasis supplied).

[15] *Id.* at 612.

[16] *Id.* at 613 (emphasis supplied).

[17] *Ibid.*

report to Congress with respect to interstate compacts,[18] and nothing more. Thus Congressman Mapes, a member of the House Interstate and Foreign Commerce Committee which drafted the bill, was able to state to the House, sitting as the Committee of the Whole, that "the only provision of the bill [which was eventually enacted] which seems to look to the conservation of the natural gas resources of the country is contained in the provision relating to the State compacts." [19]

That the 1938 Act did not give the Commission power to deal with conservation considerations was well recognized by the Commission itself in its 1940 Annual Report in which

[18] "(a) In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

"(b) It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

"(c) In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such service and facilities be made available to the Commission." 15 U.S.C.A. § 717j.

[19] 81 Cong. Rec. 6726 (1937).

it recommended a broadening of the Act to give it power to resolve conservation problems.[20]

The statute was amended in 1942.[21] But that the 1942 amendments did not give the Commission its requested power is also apparent. Neither the committee hearings[22] nor the committee reports[23] make any mention of the Commission's concern with respect to conservation. But even more important is the Commission's own concession of lack of such power which appears in its 1944 report to Con-

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[20] A proposal "to tap the Southwestern reserves of natural gas to supply the tremendous markets available in the Northeastern States poses the country with a serious problem of energy resource conservation. The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural gas resources.

"Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. * * * General use of natural gas under boilers for the production of steam is * * * under most circumstances of very questionable social economy.

"* * * *

"The Commission is convinced that these conservation problems are of such preeminent importance, especially in the present world situation, that the Natural Gas Act should be immediately broadened to give the Commission adequate power to resolve them in the public interest." 20 FPC Ann. Rp. 79-80 (1940).

[21] 56 Stat. 83-84 (1942).

[22] *Hearings on H.R. 5249 Before the House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. (1941).

[23] H.R. Rep. No. 1290, 77th Cong., 1st Sess. (1941); S. Rep. No. 948, 77th Cong., 2d Sess. (1942).

gress;[24] this report followed closely on the heels of the *Hope*[25] decision on which the Commission so heavily relies.

This Court does not say that the interstate compact was, or is, the best way to handle the conservation problem. What we do say is that this is what the Congress provided.

In 1944, the same year as the Commission's report to Congress, considerations of the end use to which the gas

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[24] "The Commission is keenly aware of the importance of conservation and the serious problems raised by the continued construction of large natural-gas pipe-lines and the accelerated depletion of our natural-gas reserves due to war activities. In its annual report to Congress for the year 1940 the Commission discussed this question at some length. In that report a number of important questions were raised, but it would appear that further studies and investigations must be conducted before satisfactory answers to these important and difficult questions can be formulated.

"In its hearings on certificate cases, under section 7(c) of the act, as amended, the Commission has freely permitted the intervention of representatives of coal, railroad, labor, and other interests concerned with the production or transportation of competing fuels. These interests have presented extensive evidence on the economic, sociological, and technological aspects of fuel competition, and their representatives have strongly urged the Commission either to deny certificates on the general grounds of conservation or to attach restrictions which would severely limit the uses for which natural gas might be sold.

"It has been the unanimous view of the Commission that, inasmuch as the Congress had not given it comprehensive powers to deal with the end uses for which natural gas is consumed, and had granted the Commission no authority to regulate rates for the direct sales of natural gas to industry, it was the duty of the Commission not to seek to exercise such authority until the Congress amended the Natural Gas Act to confer on the Commission such specific powers as Congress desired it to exercise." Federal Power Commission, *The First Five Years Under the Natural Gas Act* 15 (1944). The Commission itself thought these paragraphs important enough to quote in full in its own five-page press release on the report. See FPC Release No. 2342, January 23, 1944.

[25] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

was to be applied began to appear in the Commission's orders and opinions in certificate proceedings. Although in the initial case the Commission refused, because of the pendency of its Natural Gas Investigation, to give any weight to the contention that use of gas for boiler fuel purposes was undesirable,[26] in later cases such a contention was clearly considered as a factor weighing against the granting of a certificate.[27] Other factors weighing for or

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[26] *Memphis Natural Gas Co.*, 4 F.P.C. 197 (1944), *aff'd sub nom., Department of Conservation* v. *FPC*, 148 F. 2d 746 (5th Cir.), *cert. denied*, 326 U.S. 717 (1945). The Commission also pointed out in its opinion that the application involved extension of facilities adequately to supply present customers rather than to supply new customers.

[27] *Northern Natural Gas Co.*, 4 F.P.C. 1099 (1945), 7 F.P.C. 296 (1948) (use as boiler fuel by a power company); *East Tennessee Natural Gas Co.*, 8 F.P.C. 836 (1949), *aff'd sub nom., National Coal Ass'n.* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951) (use as boiler fuel by Atomic Energy Commission); *Piedmont Natural Gas Corp.*, 9 F.P.C. 629, 70, 83-90 (1950) (use as boiler fuel by a power company); *Texas Gas Transmission Corp.*, 10 F.P.C. 391-(1951) (use as boiler fuel by Tennessee Valley Authority and by a power company); *Transcontinental Gas Pipe Line Corp.*, 11 F.P.C. 605, 615 (1952) (use as boiler fuel by a power company); *Texas Gas Transmission Corp.*, 12 F.P.C. 658 (1953) (use as boiler fuel by a power company); *Mississippi River Fuel Corp.*, 12 F.P.C. 109, 114 (1953) (use as boiler fuel by a power company); *Panhandle Eastern Pipe Line Co.*, F.P.C. Opinion No. 274 (1954), *aff'd on other grounds sub nom., Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467 (3d Cir.), *cert. denied* 352 U.S. 891 (1956) (use as boiler fuel by a paper company and three others); *Southern Natural Gas Co.*, 14 F.P.C. 243 (1955), *aff'd sub nom., Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62 (D.C. Cir. 1956) (use as boiler fuel by power company serving three customers one of which devotes all power obtained to an Atomic Energy Commission project); *Northern Natural Gas Co.*, 15 F.P.C. 682, *rev'd* 15 F.P.C. 1634 (1956), *aff'd sub nom., National Coal Ass'n* v. *FPC*, 247 F. 2d 86 (D.C. Cir. 1957) (use as boiler fuel by a power company); *Houston Texas Gas & Oil Corp.*, 16 F.P.C. 118 (1956) (use as a boiler fuel by two Florida power companies); *Cities Service Gas Co.*, 17 F.P.C. 51[illegible] (1957) (use as boiler fuel by a power company).

against the proposed boiler fuel use in these cases included such matters as national defense, discrimination against other industrial customers, effect on existing customers, whether the service was to be part time or full time, proximity of the proposed customer to coal fields, effect on the pipe line's revenues, and the relative demand for natural gas by domestic and other industrial consumers in the area to be served.

In only four of these cases was the application for a certificate actually denied, and in one of them, the certificate was eventually granted on a rehearing a few years later.[28] In another case, the customer seeking to purchase the gas for boiler fuel was eventually successful in obtaining it, although in smaller amounts, from another pipe line subject to the Commission's jurisdiction.[29] In still another instance a pipe line's application to supply gas to two customers for boiler fuel use was denied,[30] but that same pipe line was eventually granted a certificate to supply one of the two customers.[31] In the fourth case, the denial remained unchanged.[32]

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[28] *Northern Natural Gas Co.*, 4 F.P.C. 1099 (1945), 7 F.P.C. 296 (1948).

[29] *Piedmont Natural Gas Corp.*, 9 F.P.C. 629, 70, 83-90 (1950). See *Transcontinental Gas Pipe Line Corp.*, 11 F.P.C. 605, 615 (1952).

[30] *Texas Gas Transmission Corp.*, 10 F.P.C. 391 (1951) (Mississippi Power & Light Co. and Tennessee Valley Authority).

[31] *Texas Gas Transmission Corp.*, 12 F.P.C. 658 (1953) (Mississippi Power & Light Co.).

[32] *Panhandle Eastern Pipe Line Co.*, F.P.C. Opinion No. 274 (1954), *aff'd on other grounds, sub nom., Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467 (3d Cir.), *cert. denied* 352 U.S. 891 (1956). Certificates were granted for service to three industrial companies and were denied for service to a fourth, a paper company. The latter had complained about fly ash trouble but the Commission concluded that the evidence therein indicated that the problem could be abated without resort to natural gas as boiler fuel.

All of these cases are quite distinguishable from the facts presented in the New York situation before us.[33]

We have no decided court case to give us a precedent or guidance in the matter here under discussion. Counsel for the Commission so stated and we think accurately.

In *Department of Conservation* v. *FPC*, 148 F. 2d 746 (5th Cir.), *cert. denied* 326 U.S. 717 (1945), Memphis Natural Gas Company had been granted a certificate of public convenience and necessity. The Louisiana Department of Conservation petitioned the court for an order vacating the Commission's action, contending that the application should have been denied because the gas was to be used for boiler fuel, an "inferior" use. The court in upholding the Commission's action stated: "*Assuming, without deciding,* that the commission could properly consider as one of the facts entering into the granting or denial of the certificates the uses to which the gas was to be put, that is, that considerations of conservation had a place in such granting or refusal, we think it quite plain that the statute does not make such matters determinative."[34]

In *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951), East Tennessee Natural Gas Company had been granted a certificate of public convenience and necessity. This time it was the coal and railroad interests who asked for a vacating order on the ground that the Commission had not considered the effect of the issuance of the certificate on competing fuels and transportation and had not considered the relation of the project to conservation of natural gas. Judge Bazelon, for Judge Fahy and himself, in upholding the action of the Commission stated: "Al-

[33] We do not think that any of these cases are sufficiently significant to require detailed analysis. If the Commission has authority to regulate end use as part of a conservation plan it certainly has the authority to balance the factors in each individual case as it arises.

[34] 148 F. 2d at 749-50 (emphasis supplied).

though considerations such as those suggested by petitioners *may well* be part of the complex out of which the Commission's judgment as to 'public convenience and necessity' arises, they are nowhere made standards governing the issuance or denial of certificates."[35]

In *Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62 (D.C. Cir. 1956), Southern Natural Gas Company had been granted a certificate of public convenience and necessity. The coal and railroad interests petitioned for a vacating order. Two commissioners had dissented from the order below on conservation grounds. The court in affirming the Commission's order stated: "Had the decision initially been for us we might have reached a different conclusion, on the ground of the dissent or on other grounds. But the judgment of the Commission was within its legal competence."[36]

It is apparent that none of these three cases is helpful here. Each dealt with a situation where a certificate had been granted by the Commission; the court's only concern in each was whether the Commission had failed to consider a matter of controlling significance. To say that considerations of conservation are not controlling does not aid in deciding whether or not such matters may be considered at all. In none of these cases is there any indication of a search of the legislative history to determine whether the Commission had the authority to employ such considerations in dealing with applications for certificates; obviously there was no need to make such a search. Finally, it should be mentioned that, in all three cases, the pipe line company involved was both selling and transporting the gas. That is not true here.

Nor does the Supreme Court decision in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), shed any more light

[35] 191 F. 2d at 467 (emphasis supplied).

[36] 234 F. 2d at 64.

on the matter. Although in that case, a rate-making proceeding, the State of West Virginia argued that the Commission should have considered, among other things, the effect of its rate order on conservation of West Virginia's natural gas supplies, Mr. Justice Douglas, speaking for the majority, stated: "We have searched the legislative history of the Natural Gas Act for any indication that Congress entrusted to the Commission the various considerations which West Virginia has advanced here. And our conclusion is that Congress did not."[37] On the other hand, he did go on to say that "when it comes to cases of abandonment or of extensions of facilities or service, *we may assume* that, apart from the express exemptions contained in § 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. But the Commission was not asked here for a certificate of public convenience and necessity under § 7 for any proposed construction or extension."[38] Thus this rate case has been used as authority by both sides in the present proceedings. It may be granted that the dissenting opinion of Mr. Justice Jackson goes far in stating reasons of public policy for a strong conservation program by way of husbanding our natural gas resources. But that does not put anything new into the statute.

The Commission, during the fifties, has recommended to Congress that it be given increased authority in allocation of natural gas supplies. From 1951 through 1953, the Commission requested that the Act be amended "to provide specifically for control by the Commission of the end use of natural gas when required for national defense or to safeguard the available supply."[39] In 1954 and later years that request was tempered somewhat to a request "to pro-

[37] 320 U.S. at 609.

[38] *Id.* at 612 (emphasis supplied).

[39] 31 FPC Ann. Rep. 145 (1951); 32 FPC Ann. Rep. 152 (1952); 33 FPC Ann. Rep. 154 (1953).

vide specifically for control by the Commission of the allocation of natural gas when required for national defense or to safeguard the available supply in emergency situations."[40] So far these recommendations have not been adopted. Whether they should be, or whether they should not be, and what the arguments are for each position has no bearing on our job in these cases. What we are sure of is that interstitial administrative action cannot be substituted for asked-for legislation if that legislation is not forthcoming.

Some of the argument made on behalf of Transco goes pretty far and it is worth taking the space to point out that we are not agreeing with it. It is said that the Commission can only go on what is in the record before it. That statement is too broad. Fact conclusions, of course, must be supported by testimony, but considerations of policy are open to commissions as well as to courts. A commission may call upon its administrative experience just as a court calls upon its judicial experience. But each, it may be added, must stay within the limits of its authority.

Let us now turn to the reasons given by the Commission for its denial of this certificate.

The first one was to the effect that if the requested certificate was granted the Commission would be confronted with many requests of the same general character; if this particular one was approved it would have no "fair or rational basis for denying similar such requests."

This reason is not open to the criticism that there were no facts to prove it. It is open to the criticism, however, that it is a denial of the discriminatory process which any judicial body must exercise. If the Commission has author-

[40] 34 FPC Ann. Rep. 170 (1954); 35 FPC Ann. Rep. 182 (1955); 36 FPC Ann. Rep. 18 (1956); 37 FPC Ann. Rep. 24 (1957); 38 FPC Ann. Rep. 16 (1958).

ity to act on a matter at all, it must, just as a court must, make its choice and pick out what it deems the most important determinative factors. Reason one, therefore, we think a denial of the very thing that a Commission acting semi-judicially must do.

The second reason given is that the authorization of this and similar proposals "would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs * * *." If this is not a frank expression of an assertion of authority for general conservation, we do not see how one could be expressed. We do not see any significant change in the opinion on denial of rehearing, quoted earlier. If what is said above in this opinion is correct, this reason is obviously a bad reason.

Transco makes another point in connection with this ground which we think has substance to it. The Commission talks of preemption of facilities. Transco says the Commission should have had evidence on preemption of facilities before it made such a statement. Transco argued orally to the Court that its own depreciation situation is such that it must keep on expanding facilities. Business-wise and depreciation-wise, it says, it is to its advantage to do so and for the Commission to talk about "preemption" without giving Transco a chance to demonstrate the truth of its argument is not fair administrative procedure.

Reason three is likewise an implicit assertion of the authority to conserve and allocate natural gas resources. The Commission points out that the impact of large demand on limited supply of gas is certain to raise rates even if only one bidder is bringing demand to bear on the supply. If more bidders come into the field the tendency will be increased to raise prices. In other words, the Commission wishes to discourage such bids as Con Edison made and is going to discourage them by not giving a certificate to get the gas out of the field where it has been purchased.

Here again is an implicit assertion of authority to conserve and allocate supplies.

The fourth factor or policy consideration is a bit different. This points out that while Con Edison can compete with pipe lines for gas purchases, small purchasers will not be so fortunate. And then it expresses the possibility that a pipe line may not be able or willing to continue to buy in competition with individual large purchasers. In other words, only pipe lines should purchase gas for only they engage in interstate transportation and thereby come under authority of the Commission. This puts a consideration into the statute which the Congress did not envisage. See § 1(b) of the Act.

Ending up, the Commission says that these factors would weigh against the grant even if the "gas were to be used for a demonstrably superior use." If then says, in effect, that the purpose for which these sales would be made is something less than desirable.

There was plenty of evidence in these cases from the City of New York and Con Edison that Con Edison was confronted with a very difficult problem. There was testimony that the fly ash discharge from the boilers in question at this Waterside plant was 15,000 pounds a day and the sulfur dioxide discharge 42,000 pounds daily. There was testimony that the substitution of gas to fire these two boilers in this populous section of the City would eliminate both the sulfur dioxide and the fly ash. To us it does not seem important that elimination of the smoke from these two boilers would not solve all the air pollution problems of the City of New York. There was reliable testimony that the situation would be helped, especially in the area of the United Nations Building and Tudor City.

Of course the weighing of factors of this kind, if within the jurisdiction of a body, is a matter in which a reviewing tribunal will not interfere if a rational conclusion has been reached.

More serious, however, is the assumption which the Commission makes that the proposed use was "inferior." It is true that the gas, under the agreement, was not to be sold and it was established that it was to be used to fire boilers. But these boilers, according to the evidence, generate power for electricity and make steam for heating. We do not see that using gas to make steam to heat an apartment house is inferior to the use of gas to heat a single family residence whether by steam, hot water or whatnot. The cases the Commission had here were not those of the use of gas for industrial purposes only. There was involved also the use of gas in a step for space heating and lighting. That factor was completely ignored by the Commission so far as its opinion reveals.

The conclusion of the Court is that this order must be set aside and the cases returned to the Commission with directions to issue the certificate applied for, subject to further hearing on the minor question of rates described in footnote (2).

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 12908, 12929, and 12930

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER IN No. 12908
THE CITY OF NEW YORK, PETITIONER IN No. 12929
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER IN No. 12930.

v.

FEDERAL POWER COMMISSION, RESPONDENT
NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC., SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, INTERVENORS

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of January 30, 1959 of the Federal Power Commission be, and the same is hereby set aside, and the cause remanded to the Commission with directions to issue the certificate applied for, subject to further hearing on the minor question of rates described in footnote (2) of the opinion of this Court.

Attest:

IDA O. CRESKOFF, *Clerk*

NOVEMBER 3, 1959.